Mohd Yazid bin Hashim v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO T-05-55 OF 1997
LAMIN PCA, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
12 AUGUST 1998

Criminal Law *— Murder — Appeal against conviction — Issues raised against evidence produced — Omission of trial judge to state ingredients of offence — Failure to mention other possible defence — Penal Code (FMS Cap 45)*

The appellant was convicted of the murder of one Esah bte Mamat ('the deceased') in contravention of s 302 of the Penal Code (FMS Cap 45) and was sentenced to death. He appealed against that conviction. It was contended by the appellant's counsel that he could not be convicted under s 302 of the Penal Code as the only evidence against him came from SP20. Counsel for the appellant also contended that the appellant's statement to SP20 to the effect that the deceased did not die immediately showed that he did not intend to kill the deceased for if he did, he would have 'finished her'. The next contention of the appellant's counsel was that the learned judge's omission to state the ingredients of the offence in his judgment was fatal to the case. The appellant's counsel also raised the contention pertaining to the failure of the trial judge to consider whether the appellant could be convicted under s 304 of the Penal Code.

Held, dismissing the appeal:

(1) The learned trial judge had pointed in his judgment to other evidence which when considered cumulatively with SP20's evidence caused him to be satisfied that the prosecution had proven its case beyond reasonable doubt (see p 548C).

(2) It was because the appellant did not want the deceased to identify him that the appellant had delivered the fatal blows on the deceased. These blows, in the light of the fact that the appellant did not want the deceased to identify him, and the nature of the head injuries, were ample evidence of the appellant's intention to kill the deceased (see p 549B–C).

(3) As it was not a jury trial where the elucidation of the ingredients of the offence to the members of the jury was a legal requirement, the omission of the learned trial judge to state the ingredients was not fatal. The trial judge's judgment and the record of the trial were replete with evidence and reasons supporting the judge's finding that the offence had been proven beyond reasonable doubt (see p 549D–E).

(4) The evidence showed clearly that the appellant had committed murder under s 302 of the Penal Code and could not support a conviction other than that. The trial judge's duty to mention the possible defence or defences to the jury only arises if the evidence

indicates the possible defence of one or more of the exceptions under s 300. The evidence gave no such indication (see p 549H–I); *Jeganathan v PP* [1963] MLJ 274 distinguished. A

[Bahasa Malaysia summary

Perayu telah disabitkan dengan kesalahan membunuh seorang Esah bte Mamat ('si mati'), menyalahi s 302 Kanun Keseksaan (NMB Bab 45) dan telah dijatuhkan hukuman mati. Beliau merayu terhadap sabitan kesalahan tersebut. Peguam perayu telah berhujah bahawa perayu tidak boleh disabitkan di bawah s 302 Kanun Keseksaan kerana satu-satunya bukti terhadapnya datang dari keterangan saksi SP20. Peguam perayu juga berhujah bahawa pernyataan perayu kepada SP20 bahawa si mati tidak mati serta-merta menunjukkan bahawa perayu tidak berniat untuk membunuh si mati kerana jika beliau berniat, tentulah beliau telah memastikan si mati mati pada masa itu juga. Hujah seterusnya ialah ketinggalan hakim yang arif untuk menyatakan isi kandungan kesalahan tersebut di dalam penghakimannya membawa padah kepada kes tersebut. Peguam perayu juga berhujah berkenaan dengan kegagalan hakim perbicaraan untuk menimbangkan sama ada perayu boleh disabitkan di bawah s 304 Kanun Keseksaan. B C D

Diputuskan, menolak rayuan: E

(1) Hakim perbicaraan yang arif telah merujuk di dalam penghakimannya kepada keterangan yang lain yang jika bila dipertimbangkan secara kumulatif dengan keterangan SP20 membuatkan beliau berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat ms 548C). F

(2) Oleh kerana perayu tidak mahu si mati mengenalinya, perayu telah memukul si mati dengan pukulan-pukulan yang membawa maut. Pukulan-pukulan tersebut, dipertimbangkan dengan hakikat keinginan perayu agar si mati tidak dapat mengenalinya, dan sifat kecederaan kepala yang dialami adalah keterangan yang mencukupi bahawa perayu berniat membunuh si mati (lihat ms 549B-C). G

(3) Oleh kerana ia bukanlah satu perbicaraan juri yang mana penerangan isi kandungan kesalahan kepada ahli juri adalah satu keperluan undang-undang, ketinggalan hakim perbicaraan yang arif untuk menyatakan isi kandungan kesalahan tidak membawa padah. Keputusan hakim perbicaraan dan rekod perbicaraan adalah lengkap dengan keterangan dan alasan menyokong keputusan hakim bahawa kesalahan tersebut telah dibuktikan melepasi keraguan yang munasabah (lihat ms 549D–E). H

(4) Bukti telah dengan jelas menunjukkan bahawa perayu telah melakukan pembunuhan di bawah s 302 Kanun Keseksaan dan tidak dapat menyokong kesabitan selain daripada itu. I

A Tanggungjawab hakim perbicaraan untuk menyebut lain-lain pembelaan kepada para juri hanya timbul jika bukti menunjukkan kemungkinan pembelaan yang lain di bawah pengecualian kepada s 300. Bukti-bukti tidak menunjukkan yang sedemikian (lihat ms 549H–I); *Jeganathan v PP* [1963] MLJ 274 dibeza.

B

Notes

For a case on appeal against conviction, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) para 922.

C **Case referred to**

Jeganathan v PP [1963] MLJ 274 (distd)

Legislation referred to

D Penal Code (FMS Cap 45) ss 300, 302, 304

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Abang Iskandar (Deputy Public Prosecutor) for the respondent.

Ahmad Fairuz JCA (delivering the judgment of the court): The appellant
E was convicted of the murder of one Esah bte Mamat ('the deceased') in contravention of s 302 of the Penal Code (FMS Cap 45) and was sentenced to death. He appealed against that conviction. We dismissed his appeal and now state the grounds of our decision.

Briefly, the evidence for the prosecution revealed that the deceased was found dead at about 10am on 2 January 1996. She suffered several injuries
F on her left arm, face and head. Medical evidence disclosed that the head injuries had caused the deceased's death. Medical evidence further divulged that the head injuries were caused by several successive blows with a blunt instrument like that piece of wood tendered by the prosecution as P19A. These blows had also caused a fracture at the left part of the deceased's skull. It was also unfolded by the prosecution that the deceased owned
G jewelleries, some of which she used to wear and some she carried in her handbag whenever she attended functions. She was last seen attending a talk at Bukit Kecil mosque on 30 December 1995. She had her handbag with her then. The prosecution further uncovered three pawn receipts dated 31 December 1995 in the possession of the appellant. The receipts were
H issued by Yew Lee Pawnshop. From this pawnshop and from the appellant, the jewelleries of the deceased were recovered. It was the prosecution's case that the appellant had struck the fatal blows on the deceased and had taken away her jewelleries. The appellant had kept some of the jewelleries to himself and had, on 31 December 1995, pawned the others for the sum of RM 7,000. With a part of this money he bought a motorcycle.

I It was the appellant's case that on 30 December 1995 at about 2pm the appellant, with two of his friends (that is Jen Juling and Man), were consuming drugs in some bushes at Bukit Kecil. They then planned to

break into the deceased's house. As they were carrying out their plan, the deceased returned. On seeing the deceased they ran away. Before the appellant ran, he saw Man struck the deceased with a piece of wood. The appellant, later, went to Jalan Pasir Panjang where he met Jen Juling who handed him a package containing jewelleries wrapped with a handkerchief. The sole witness called by the appellant was his sister who deposed to the fact that the appellant tried to sell the three pawn receipts to her. She did not buy them as the receipts did not contain the appellant's name.

It was contended by the appellant's counsel that the appellant could not be convicted under s 302 Penal Code as the only evidence against the appellant came from SP20. The learned trial judge, however, had pointed in his judgment to other evidence which when considered cumulatively with SP20's evidence caused him to be satisfied that the prosecution had proven its case against the appellant beyond reasonable doubt. It was clear from his judgment that the learned trial judge had:

(a) considered the evidence that SP11 had, at about 2pm on 30 December 1995, carried the appellant on his motorcycle to Bukit Kecil. And the deceased's house was at Bukit Kecil;

(b) relied on the evidence of SP13 who also had carried the appellant on his motorcycle from Jalan Gong Kapas which was close to Bukit Kecil to Kampong Tiong and two other places. This was at about 4pm on 30 December 1995;

(c) also taken into consideration the evidence which showed that the appellant was in possession of three pawn receipts which led to the recovery of the deceased's jewelleries;

(d) considered the medical evidence on the injuries that caused the deceased's death.

Other than the aforesaid findings of facts by the learned trial judge as disclosed in his judgment, the notes of evidence also revealed that SP13 had in fact identified P25 as the shirt worn by the appellant on 30 December 1995 at about 4pm. SP20 who lived at Kampong Tiong had identified P23 as the trousers worn by the appellant between 4–5pm on 30 December 1995. P23 and P25 were sent to the chemist ('SP1') who testified that the deceased's blood were found on them.

In relation to the pawn receipts, SP13 had also deposed in evidence that the appellant had tried on the same day (30 December 1995) to pawn jewelleries at two pawnshops but failed to do so because the shops were closed. SP13 was also shown by the appellant the jewelleries wrapped with a handkerchief.

The abovementioned concise exposure of the evidence tendered before the learned trial judge are, in our view, sufficient to support the learned trial judge's finding at the close of the prosecution's case that the prosecution had proved its case beyond reasonable doubt.

The next issue taken up by the appellant's counsel was in relation to the appellant's statement to SP20 to the effect that the deceased did not die.

A The counsel contended that if the appellant had the intention to cause the death of the deceased then the appellant would have 'finished her'. To this, the Deputy Public Prosecutor ('DPP') referred us to the whole sentence of what the appellant had said, that is: '... Katanya, mak cik itu tak mati, cuma dia tak mahu mak cik itu cam dia ...'. It was argued by the DPP that because the appellant did not want the deceased to identify him, the appellant had B delivered the fatal blows on the deceased with P19A. We agree with this argument. More so, when the medical evidence on the injuries that caused the deceased's death revealed that the injuries were the result of several successive blows with P19A. These blows, considered in the light of the appellant not wanting the deceased to identify him, and the nature of the C deceased's head injuries which include the fracture of her skull are ample evidence of the appellant's intention to kill the deceased.

The next contention of the appellant's counsel was on the learned trial judge's omission to state the ingredients of the offence under s 302 Penal Code in his judgment. As this is not a jury trial wherein an elucidation of the ingredients of the offence to members of the jury is a legal requirement D (under the Criminal Procedure Code before the abolishment of the jury trial), we are of the view that such omission by the learned trial judge, who is not only legally qualified but experienced in court trials and practice, cannot be fatal so long as the learned trial judge's judgment and the record of the trial are replete with evidence and reasons supporting the judge's E finding that the offence had been proven beyond reasonable doubt. And this is what the learned trial judge's judgment and the record in this appeal had shown. In his judgment, the learned trial judge had shown how he arrived at the finding that the deceased died as a result of the injuries on her head. The learned trial judge had spelt out in his judgment the various circumstantial evidence that irresistibly pointed out to the fact that the F appellant was the author of those blows that inflicted the fatal injuries on the deceased's head. The injuries suffered by the deceased and SP20's evidence in particular had been stressed by the learned trial judge as ample evidence of the appellant's intention to cause the deceased's death. We, therefore, hold that the omission of the learned trial judge cannot, in the circumstances of this case, affect the conclusion of the learned trial judge G that the prosecution had proved its case beyond reasonable doubt.

The appellant's counsel also raised the contention pertaining to the failure of the learned trial judge to consider whether the appellant could be convicted under s 304 of the Penal Code. To this, the DPP emphasized that the evidence showed clearly that the appellant had committed murder H under s 302 of the Penal Code. We agree with the DPP that the evidence disclosed cannot support a conviction for any other offence except murder under s 302 of the Penal Code. The case of *Jeganathan v PP* [1963] MLJ 274 cited by the appellant's counsel, clearly shows that the duty of the trial judge to mention the possible defence or defences to the jury only arises *if the evidence indicates* the possible defence of one or more of the exceptions I under s 300 of the Penal Code. In this appeal now before us, the evidence gives no such indication. In fact, the evidence tendered by the defence exculpates the appellant completely of the offence of murder. As such we

are of the view that there was no necessity for the trial judge to address himself on s 304 of the Penal Code.

For the abovementioned reasons we are left with no alternative except to agree that the learned trial judge was right when, at the conclusion of the defence, he held that the defence had not raised any reasonable doubt in the prosecution's case. Consequently, this appeal must be dismissed and we confirmed the conviction and sentence made by the High Court.

Appeal dismissed.

Reported by Zahid Taib